No. 80-1238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JOSEPH A. CAROTHERS, PAUL L. SCHMETZER, JOSEPH A. MUNGOVAN, DAVID E. FLANIGAN, Individually and as representatives of a class of certain shareholders and stock option holders of Cybernetics & Systems, Inc., a Delaware corporation,

Petitioners,

vs.

W. THOMAS RICE, PRIME F. OSBORN, CYBERNETICS & SYSTEMS, INC., L&N INVESTMENT CORPORATION, LOUISVILLE & NASHVILLE RAILROAD COMPANY, SEABOARD COAST LINE RAILROAD COMPANY, SEABOARD COAST LINE INDUSTRIES, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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The Respondents, W. Thomas Rice, Prime F. Osborn, Cybernetics & Systems, Inc., L&N Investment Corporation, Louisville and Nashville Railroad Company, Seaboard Coast Line Railroad Company, and Seaboard Coast Line Industries, Inc., respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the Sixth Circuit Court of Appeals in this case. That decision is reported at 633 F.2d 7.

STATEMENT OF THE CASE

Respondents deny that they engaged in an improperly conducted offer to purchase stock and stock options, or that such was misleading, fraudulent, or involved coercion or an inadequate price. Respondents deny that any wrongful manipulation of the affairs of Cybernetics occurred, that improper motives existed or that the alleged representations were made. Although Respondents additionally take issue with certain of the remaining contentions, alleged to be fact by Petitioners, they exercise their right at this stage of the proceeding to forego a more detailed response, reserving such a more detailed response for Respondents' brief should certiorari be granted.

REASONS WHY THE WRIT SHOULD BE DENIED

1. There is no conflict in the circuits.

Petitioners assert that a conflict exists among the United States Courts of Appeals as to the appropriate statute of limitations to be applied in actions under Section 10(b) of the Securities Exchange Act of 1934 and that this Court should grant certiorari to resolve the issue. There is no conflict among the circuits on this issue, however. The differences in results to which Petitioners point are attributable to differences in the relevant state laws being examined by the Courts of Appeals, not to the application of different standards by the Courts of Appeals.

This Court has stated that in the absence of a federal statute of limitations, a federal court should look to the analagous state law to determine the appropriate statute of limitations for the federal cause of action. *Cope* v. *Anderson*, 331 U.S. 461 (1947). That the various Courts of Appeals understand this test well and apply it uniformly is shown by the following decisions wherein the several courts articulate the standard:

Cook v. *Avien, Inc.*, 573 F.2d 685 (1st Cir. 1978) ("§10(b) of the Securities Exchange Act of 1934 ... has no statutorily

prescribed limitations period. Federal courts must therefore look to the limitations period applicable to the analagous cause of action under state law to determine the period limiting actions brought under the section and its correlative rule.")

IIT v. *Cornfeld*, 619 F.2d 909, 928 (2d Cir. 1980) ("Federal law looks to analagous state law to supply the period of limitations for Rule 10(b)(5) actions.")

Roberts v. *Magnetic Metals Company*, 611 F.2d 450, 452 (3d Cir. 1979) ("No federal statute imposes an express limitation upon actions brought under Sections 10(b) and 14(a) of the Securities Exchange Act. In such circumstances, a federal court must apply the limitations law of the state in which it sits.")

O'Hara v. *Kovens*, 625 F.2d 15, 18 (4th Cir. 1980) *cert. denied*, No. 80-580 (Jan. 26, 1981) ("When borrowing a state statute of limitations for federal purposes, a court should look to the statute which most clearly addresses the same or similar policy considerations as are addressed by the federal right being asserted.")

Hudak v. *Economic Research Analysts, Inc.*, 499 F.2d 996, 999 (5th Cir.), *cert. denied*, 419 U.S. 1122 (1974) ("The federal securities laws contain no limitation period that is expressly applicable to claims under Section 10(b) and Rule 10b-5, nor does federal law prescribe any general statute of limitations for civil actions. Consequently, the limitation period which the forum state applies to the state remedy which bears the closest substantive resemblance to Rule 10b-5 and which best effectuates its purpose is to be applied.")

Cahill v. *Ernst & Ernst*, 625 F.2d 151, 153 (7th Cir. 1980) ("Since no statute of limitations is provided for civil actions under Section 10(b) of the Securities Exchange Act of 1934, the federal courts apply the limitation period applicable to the forum state's most closely analagous state law cause of action.")

Vanderboom v. *Sexton*, 422 F.2d 1233, 1237 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) ("[W]hen the federal legislative act

is silent as to the statute of limitations applicable to it, the limitations period of the forum state is applied.")

United California Bank v. *Salik*, 481 F.2d 1012, 1014 (9th Cir.), *cert. denied*, 414 U.S. 1004 (1973) ("When, as in a case such as this, the statute is silent, we look to 'an appropriate local law of limitations.' ")

Mitchell v. *Texas Gulf Sulphur Company*, 446 F.2d 90, 103 (10th Cir.), *cert. denied*, 404 U.S. 1004 (1971) ("The settled rule is that when a federal statute is silent as to the statute of limitations, the appropriate period of limitation of the forum state is applied.")

Forrestal Village, Inc. v. *Graham*, 551 F.2d 411, 413 (D.C. Cir. 1977) ("It is well established that when, as here, Congress has created a federal right but has not prescribed a limitation period for enforcement, federal courts will borrow the period of limitations prescribed by the state where the court sits .... The basic standard for determining which of the local periods of limitation to utilize is the one that 'best effectuates the federal policy involved.' ")

Any difference in result from the application of the above standard is due to the differences in the particular state laws to which the federal courts look for guidance in choosing a statute of limitations for 10b-5 actions. A good example of this is the Sixth Circuit. In two decisions prior to the one at bar, *I.D.S. Progressive Fund, Inc.* v. *First of Michigan Corp.*, 533 F.2d 340 (6th Cir. 1976), and *Nickels* v. *Koehler Management Corp.*, 541 F.2d 611 (6th Cir.), *cert. denied*, 429 U.S. 1074 (1976), the Sixth Circuit examined the common law fraud and state blue sky statutes of Michigan and Ohio, respectively, and determined that in each instance, the fraud statute of limitations was the more appropriate one to govern a 10b-5 action. Yet, in this case, the Sixth Circuit has again made a careful examination of the state statutes before it (this time Kentucky's) and in applying the very same standard which it applied in the earlier cases, found

that the state blue sky statute of limitations is the appropriate one to govern this cause of action. The differences in result in these three cases are not attributable to a difference in "the circuit's interpretations of the test to be applied," as argued by Petitioners in their brief, but rather are attributable to differences in the statutes of Michigan, Ohio, and Kentucky.

2. The establishment of a uniform limitations period for Section 10(b) actions would be contrary to legislative intent and to principles of federalism.

Petitioners are asking this Court to grant certiorari to review the decision of the Sixth Circuit and to "provide consistency and direction to the Circuits" in their application of the above standard. In effect, petitioners are requesting that the Court issue regulations that will create a uniform statute of limitations for 10b-5 actions. Such an action would be contrary to legislative intent. Had Congress intended there to be a uniform statute of limitations for 10b-5 actions, it could easily have established one.

Additionally, concepts of federalism require deference to state statutes in these circumstances. This is not the only area in which Congress has left federal courts to apply analagous state laws in determining appropriate statutes of limitations, rather than to establish a uniform limitations period. For example, the same "resemblance" test is applied to determine the appropriate statute of limitations in actions under the Labor Management Relations Act, 29 U.S.C. §141, *et seq.*, *see Gray* v. *International Association of Heat & Frost Insulators and Asbestos Workers, Local No. 51*, 416 F.2d 313 (6th Cir. 1969); the Labor Management Reporting and Disclosure Act, 29 U.S.C. §401, *et seq. see Abrams* v. *Carrier Corp.*, 434 F.2d 1234 (2d Cir. 1970); and the Railway Labor Act, 45 U.S.C. §151, *et seq.*, *see Price* v. *Southern Pacific Transportation Company*, 586 F.2d 750 (9th Cir. 1978).

3. The decision of the Sixth Circuit is correct on the merits and does not warrant the grant of certiorari.

The well reasoned opinion of the court below articulates Respondents' substantive arguments on the merits and Respondents will not repeat those arguments here. That decision is correct on the merits and should not be reversed. Additionally, the decision below turns on an issue of state law - the examination and construction of two Kentucky statutes to determine which is most closely analogous to the federal cause of action. Since the Sixth Circuit applied the proper test in this case, the question for review by this Court would be which Kentucky statute best effectuates the purpose of the federal securities laws. Respondents submit that this narrow issue of state law does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated this 17th day of February, 1981.